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IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

HONDA MOTOR CO., LTD.; HONDA R&D CO., LTD.; AND AMERICAN HONDA MOTOR CO., INC.,
Petitioners,

v.

KARL L. OBERG,
Respondent.

On Writ of Certiorari to the Supreme Court of Oregon

BRIEF *AMICI CURIAE* FOR THE AMERICAN COUNCIL OF LIFE INSURANCE, THE NATIONAL ASSOCIATION OF INDEPENDENT INSURERS, THE ALLIANCE OF AMERICAN INSURERS AND THE AMERICAN INSURANCE ASSOCIATION IN SUPPORT OF THE PETITIONERS

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QUESTION PRESENTED

This brief addresses the following question:

Whether, and to what extent, the Due Process Clause of the Fourteenth Amendment requires state courts to review punitive damages verdicts for excessiveness.

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INTERESTS OF THE AMICI

The *amici* are trade associations representing the interests of many of the life, health and property and casualty insurers in the United States.[1] Specifically, the American Council of Life Insurance, the largest life insurance trade association in the United States, represents the interests of 640 member life insurance companies; these companies currently underwrite 90.9 percent of

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[1] Counsel for both the Petitioners and the Respondent have consented to the filing of this brief. Their consents are on file with the Clerk.

the life insurance in force in legal reserve life insurance companies in the United States. The National Association of Independent Insurers, the largest association of property and casualty insurers in the country, represents over 560 property and casualty insurers writing over one-quarter of the property and casualty insurance sold in the United States. The Alliance of American Insurers represents approximately 180 insurance companies that write property and casualty insurance nationwide, with annual premiums representing over ten percent of such insurance. The American Insurance Association represents 195 property and casualty insurers; these companies are affiliated with 65,000 independent insurance agents nationwide.

Defining the procedural and substantive limitations that the Due Process Clause of the Fourteenth Amendment imposes on punitive damages is an issue of vital importance to the *amici's* members. In recent years, courts have permitted juries to assess substantial punitive damages awards against insurers, often in the absence of due process constraints, and have deferred to those awards even though they are imposed without meaningful standards and bear no rational, objective relationship to the purposes of punishment and deterrence. These decisions drastically and unpredictably enlarge the risks facing insurers, which must rely on a predictable allocation of risks and costs in providing insurance, and jeopardize their ability to offer affordable insurance. Because of their genuine interest in the constitutionality of current punitive damages law, therefore, the *amici* have filed briefs in this Court in prior cases involving this issue. *See, e.g., TXO Prod. Corp. v. Alliance Resources Corp.*, 113 S. Ct. 2711 (1993); *Pacific Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1 (1990); *Browning-Ferris Indus. v. Kelco Disposal, Inc.*, 492 U.S. 257 (1989); *Bankers Life & Casualty Co. v. Crenshaw*, 486 U.S. 71 (1988); *Aetna Life Ins. Co. v. Lavoie*, 475 U.S. 813 (1986).

This brief presents to the Court the views of the *amici*, based on the experiences of their broad-based constituencies, on two of the issues in this case: (1) whether Oregon's refusal to provide any judicial review of juries' punitive damages awards for excessiveness violates defendants' procedural due process rights

and (2) what factors courts should be required to consider in conducting such a review.[2]

STATEMENT

1. Because Petitioners set the facts forth fully in their brief, the *amici* only summarize the facts here. Respondent Karl Oberg ("Oberg") was injured while driving an all-terrain vehicle that had been manufactured and sold by petitioners Honda Motor Co., Ltd.; Honda R&D Co.; and American Honda Motor Co., Inc. ("Honda"). Appendix to Petition for Certiorari ("Pet. App."), at 1a. Oberg then filed suit, in an Oregon state court, against Honda, including claims for both negligence and strict liability. *Id.* A jury awarded Oberg $919,390.39 in compensatory damages (which was reduced to $735,512.31 on the basis of comparative fault) and $5 million in punitive damages. *Id.* at 1a n.1.

2. Honda filed motions for a new trial and for judgment notwithstanding the verdict. In its motions, Honda argued, among other things, that the punitive damages award was grossly excessive. Petition for Certiorari ("Pet."), at 3-4. The trial court denied those motions without explanation. Pet. App. 89a-90a.

3. Honda appealed to the Oregon Court of Appeals, arguing, among other things, that the award of punitive damages was excessive and violated its rights under the Due Process Clause. Pet. App. 1a-2a. However, the Court of Appeals refused to entertain Honda's challenge to the amount of the award because the Oregon Constitution "prohibits trial and appellate courts from setting aside a verdict on the ground that it is excessive." *Id.* at 86a-87a. Despite Honda's contentions, the Court of Appeals did not believe that the Due Process Clause requires courts to review jury verdicts for excessiveness. *Id.* at 82a-83a.

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[2] This case also presents the issue of whether, and in what fashion, courts are required, as a matter of procedural due process, to review juries' awards of *compensatory* damages. The *amici* do not address that issue in this brief.

4. The Oregon Supreme Court affirmed, holding that the Due Process Clause does not require "a form of post-verdict or appellate review that includes the possibility of remittitur." Pet. App. 25a. It concluded that Oregon's scheme for awarding punitive damages complies with the Due Process Clause because (1) juries are required to consider certain "objective" criteria when deciding whether to award punitive damages and how large the award should be;[3] (2) trial and appellate courts may vacate the award, in its entirety, if the jury was not properly instructed; and (3) trial and appellate courts may vacate the award, in its entirety, if there was "no evidence" to support the award. *Id.* at 20a-27a.

SUMMARY OF ARGUMENT

I. Applying the three-part test set forth in *Mathews v. Eldridge*, 424 U.S. 319 (1976), it is clear that the Due Process Clause of the Fourteenth Amendment requires state courts to review punitive damages awards made by juries in order to determine whether those awards are excessive. *First*, punitive damages awards are often sizable and deprive defendants of significant "property" interests within the meaning of the Due Process Clause. *Second*, denying any judicial review of such awards for excessiveness, as Oregon does, creates an unacceptable risk that defendants will be erroneously deprived of their property. When a jury acts under the influence of passion and prejudice, and that bias is reflected only in the size of the award, there is no way to correct the injustice if courts lack the power to interfere with the award. *Finally*, neither plaintiffs nor the state of Oregon would be significantly burdened by a requirement of

[3] In this case, for example, the jury was instructed to consider five criteria: (1) the likelihood at the time of the sale that serious harm would arise from the defendants' misconduct, (2) the degree of the defendants' awareness of that likelihood; (3) the duration of the misconduct; (4) the attitude and conduct of the defendants upon notice of the alleged condition of the vehicle; and (5) the financial condition of the defendants. Pet. App. 22a-23a n.11.

some judicial review for excessiveness of juries' punitive damages awards. Defendants in Oregon are already permitted to challenge such awards on other grounds, and the many states that have provided for excessiveness review have not found that review to be unduly burdensome.

II. Oregon stands apart in its refusal to provide for some judicial review for excessiveness of punitive damages awards -- and, in doing so, tolerates an unacceptable risk of depriving litigants of fundamental rights to due process. This case thus affords the Court an opportunity to clarify not only that the Due Process Clause requires some judicial review of these awards, but also the minimum standards that courts should apply in determining whether an award of punitive damages is so excessive as to violate the Due Process Clause.

It is clear from this Court's prior decisions that the Due Process Clause does impose some limitation on the amounts of punitive damages that civil juries can award and that "concerns of reasonableness" enter into determining whether an award is constitutionally excessive. *Pacific Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 18 (1990). But the Court has not yet addressed, as a general matter, the standards that courts should use in determining whether particular awards are so excessive as to violate the Due Process Clause.

The *amici* do not propose that this Court formulate some kind of ironclad "test" for determining whether particular punitive damages awards are constitutionally excessive. Nor do they propose that the Court attempt to make an exhaustive enumeration of the factors that courts should consider in making such a determination. They do, however, propose that the Court articulate a non-exclusive list of relatively objective and measurable criteria for courts to consider in determining whether particular awards are so excessive as to violate the Due Process Clause -- such as the extent to which the defendant profited from its misconduct; the plaintiff's reasonable litigation costs, to the extent not otherwise provided by statute; the quantifiable harm that has resulted from the defendant's misconduct, as well as the

quantifiable harm that was substantially likely to result from that misconduct; the size of legislative penalties for misconduct similar to the defendant's conduct; and the size of punitive damages awards rendered in other, similar cases. Requiring courts to consider such criteria would provide them with guidance in exercising their discretion, and help to avoid the danger of arbitrary judicial action, while retaining for them the freedom to accommodate their analysis to the specific demands of particular cases.

ARGUMENT

I. OREGON'S REFUSAL TO PROVIDE ANY JUDICIAL REVIEW OF JURIES' PUNITIVE DAMAGES AWARDS FOR EXCESSIVENESS VIOLATES THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT

In assessing whether the Due Process Clause of the Fourteenth Amendment requires the use of particular procedures in civil cases, this Court in recent years has employed the three-part test set forth in *Mathews v. Eldridge*, 424 U.S. 319 (1976).[4] That test requires the Court to consider:

> First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures [currently] used, and the probable value, if any, of additional or substitute procedural

[4] In *Medina v. California*, 112 S. Ct. 2572, 2576 (1992), the Court held that "the *Mathews* balancing test does not provide the appropriate framework for assessing the validity of state procedural rules which, like the one at bar, are part of the criminal process." However, awards of punitive damages, at least in cases between private parties, are not "part of the criminal process." *See Browning-Ferris Indus. v. Kelco Disposal, Inc.*, 492 U.S. 257, 260 (1989) (the Eighth Amendment, which places constraints on "criminal process and . . . direct actions initiated by government to inflict punishment," does not "apply to awards of punitive damages in cases between private parties").

> safeguards; and finally the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

Id. at 335.[5] When the foregoing criteria are applied to Oregon's denial of any review for excessiveness, it is clear that denying such review violates the Due Process Clause.

A. Punitive Damages Awards Implicate Sizable Property Interests

There can be no question that an award of punitive damages deprives a defendant of "property" within the meaning of the Due Process Clause.[6] Nor can there be any question that such awards are often huge. *See, e.g., Haslip*, 499 U.S. at 61 (O'Connor, J., dissenting)("Recent years . . . have witnessed an explosion in the frequency and size of punitive damages awards"); W. Volz & M. Fayz, *Punitive Damages and the Due Process Clause: The Search for Constitutional Standards*, 69 U. Det. Mercy L. Rev. 459, 462 n.17 (1992) (observing that the trend towards larger punitive damages awards, as noted by previous commentators, "appears to continue unabated," and citing a number of multimillion-dollar verdicts rendered in the period 1990-1991).

[5] As discussed *infra*, in Part I-C of the Argument, the third prong of the *Mathews* analysis is somewhat modified when, as in the present case, the dispute is between private parties. *Connecticut v. Doehr*, 111 S. Ct. 2105, 2112 (1991) (giving primary attention to the additional burdens imposed upon the opposing party). However, in the present case, the result should be the same under either standard.

[6] As petitioners have correctly noted, this proposition is so obvious that the Court has not even paused to discuss it when analyzing due process challenges to punitive damages awards. *See Pacific Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1 (1991); *TXO Prod. Corp. v. Alliance Resources Corp.*, 113 S. Ct. 2711 (1993).

B. Without Some Judicial Post-Verdict Review For Excessiveness Of Punitive Damages Awards, There Is A Significant Risk That Defendants Will Be Erroneously Deprived Of Their Property

There are at least two reasons why denying any judicial post-verdict review for excessiveness of punitive damages awards creates an unacceptable risk that defendants will be erroneously deprived of their property.

First, it is widely recognized, and has often been noted by this Court, that when awarding punitive damages, juries sometimes make those awards under the influence of passion and prejudice. *See, e.g., Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 350 (1974) (juries may "use their discretion selectively to punish expressions of unpopular views"). Indeed, jurors "are more susceptible to such influences than judges." *TXO Prod. Corp. v. Alliance Resources Corp.*, 113 S. Ct. 2711, 2728 (1993) (O'Connor and White, JJ., dissenting). This is a particular danger with respect to certain kinds of defendants, such as insurance companies, like the members of the *amici*, or large out-of-state corporations, like Honda. *See, e.g., TXO Prod. Corp.*, 113 S. Ct. at 2723 (plurality opinion) (recognizing the possibility of "[jury] prejudice against large corporations, a risk that is of special concern when the defendant is a nonresident"); *id.* at 2737 (O'Connor, Souter, and White, JJ., dissenting) ("Courts long have recognized that jurors may view large corporations with great disfavor"); M. Peterson, S. Sarma & M. Shanley, *Punitive Damages: Empirical Findings* 22-24, 50 (Rand Institute for Civil Justice 1987) ("Punitive awards against businesses were far larger than those against individuals in both personal injury and business/contract cases").

It has long been a fixture of this Court's due process jurisprudence that everyone is entitled, at a minimum, to be judged by a neutral and unbiased decisionmaker. *See, e.g., In re Murchison*, 349 U.S. 133, 136 (1955) ("A fair trial in a fair tribunal is a basic requirement of due process. Fairness requires an absence of actual bias in the trial of cases"). When juries

render excessive punitive damages awards under the influence of bias or prejudice, and courts are denied the power to correct the effects of that prejudice, defendants are clearly deprived of what this Court has long regarded as a basic constitutional right to a fair trial. *See Browning-Ferris Indus. v. Kelco Disposal, Inc.*, 492 U.S. 257, 276 (1989) ("The parties agree that due process imposes some limits on jury awards of punitive damages, and it is not disputed that a jury award may not be upheld if it was the product of bias or passion . . ."); *Haslip*, 499 U.S. at 41 (Kennedy, J., concurring) ("A verdict returned by a biased or prejudiced jury no doubt violates due process, and the extreme amount of an award compared to the actual damage inflicted can be some evidence of bias or prejudice in an appropriate case"); *TXO Prod. Corp.*, 113 S. Ct. at 2729 (O'Connor and White, JJ., dissenting) ("Influences such as caprice, bias, passion, and prejudice are antithetical to the rule of law. If there is a fixture of due process, it is that a verdict based on such influences cannot stand").

The only way to correct such deprivations of due process is to provide courts with the power to review and modify the inflated award. Contrary to the holding of the court below, the protections currently afforded by Oregon -- protections that do not include judicial review for excessiveness -- simply will not suffice to address such erroneous deprivations.

It is true that, as the court below pointed out, Oregon trial courts instruct juries to consider a number of specific factors when determining punitive damages. Pet. App. 21a-22a. Juries, however, still have broad discretion in determining the amount of such awards, leaving ample room for prejudice against particular defendants to infect the process.[7] It is also true that Oregon

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[7] Generally, in Oregon, "the finder of fact must determine what punitive damages, if any, to award" by looking at a number of factors that "may be relevant, including the seriousness of the hazard to the public, the attitude and conduct of the wrongdoer upon learning of the hazard, the

appellate courts can review the sufficiency of the trial court's instructions (*id.* at 27a-28a), but doing so does not protect against the danger of inflated awards rendered under the influence of passion and prejudice. That danger exists even when the jury has been properly instructed on how to make its determination. Finally, although Oregon courts may vacate an award of punitive damages, in its totality, when there is no evidence at all to support any award of punitive damages (*id.* at 27a), that protection will not affect those cases in which it is reasonable to award *some* punitive damages, but not in the amount determined by the jury.[8]

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number and position of employees involved in causing or covering up the misconduct, the duration of the misconduct and/or its cover-up, the financial condition of the wrongdoer, and prior or potential punishment from similarly situated plaintiffs or other sources." Pet. App. 24a (citing cases). In product liability actions, such as the present case, "[p]unitive damages shall be determined and awarded based upon the following criteria: (a) The likelihood at the time that serious harm would arise from the defendant's misconduct; (b) The degree of the defendant's awareness of that likelihood; (c) The profitability of the defendant's misconduct; (d) The duration of the misconduct and any concealment of it; (e) The attitude and conduct of the defendant upon the discovery of the misconduct; (f) The financial condition of the defendant; and (g) The total deterrent effect of other punishment imposed on the defendant as a result of the misconduct . . . ." Or. Rev. Stat. § 30.925(3).

[8] It is also true that most, if not all states (and presumably Oregon as well) allow the parties' counsel, through *voir dire*, to challenge the seating of jurors whom they believe to be biased against their clients. *See* 5 *Am. Jur. Trials* 149 (1966) ("In most American jurisdictions, if not all, the law grants an absolute right, upon demand, to have some voir dire examination take place"). However, it is not always possible to ascertain bias before the trial has begun. And it is for just that reason that the vast majority of states, despite the protections afforded in the *voir dire* process, also permit their courts to review the jury's ultimate verdict to determine whether the jury arrived at an inflated award under the influence of passion and prejudice. *See* Pet. 6 & n.3.

Second, denying any review for excessiveness creates an unacceptable risk of error because even the most fair and impartial jury lacks the proper framework for determining what amount of punitive damages will best accomplish the goals of punishment and deterrence. The jury, as an institution, is not particularly well-suited to making broad policy decisions and is not politically accountable for those decisions. Quite the contrary, juries face individualized facts and are particularly ill-equipped to take into account the broad impact of a punitive award on others and thus to determine when a penalty furthers the state's legitimate goals. *See, e.g.*, J. Sales & K. Cole, *Punitive Damages: A Relic That Has Outlived Its Origins*, 37 Vand. L. Rev. 1117, 1159 (1984); D. Owen, *Punitive Damages in Products Liability Litigation*, 74 Mich. L. Rev. 1258, 1320-21 (1976).[9]

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[9] As Professor Clarence Morris so aptly explained almost sixty years ago:

> In determining whether or not the defendant has been a "reasonably prudent man" or an "intentional wrongdoer," the jury's task is to reflect the social values of the community; the jury evaluates the defendant's past behavior, it determines whether or not his past conduct should be condemned. But in fixing the amount of punitive damages the considerations all look to the future conduct of the defendant and others; the question is: how large a judgment is needed to discourage this sort of conduct in the future? Evaluation of past conduct is a different type of problem from control of future behavior. It is evident that problems of social control may require more technical skill than jurymen have or can acquire. Probably, many on jury panels can not think of punishment as a means to an end, as an expedient for reformation and deterrence, and only regard punishment as legal, justifiable revenge.

C. Morris, *Punitive Damages in Tort Cases*, 44 Harv. L. Rev. 1173, 1179 (1931).

C. Neither Plaintiffs Like Oberg, Nor The State Of Oregon, Would Be Significantly Burdened By A Requirement That There Be Some Judicial Post-Verdict Review Of Punitive Damages Awards

There is a final factor to be considered under *Mathews v. Eldridge* when, as in this case, the dispute is between private parties: the burdens that the additional procedural requirement (review for excessiveness) would impose, with "principal attention to the interest of the party seeking [punitive damages]" and with "due regard for any ancillary interest the government may have in providing the procedure or forgoing the added burden of providing greater protections." *Connecticut v. Doehr*, 111 S. Ct. 2105, 2112 (1991).

Neither plaintiffs like Oberg nor the state of Oregon would be significantly burdened by the additional costs of litigating the issue whether a jury's award of punitive damages was excessive. Indeed, as noted above, Oregon already permits defendants to challenge punitive damages awards on other grounds -- i.e., on the basis of improper jury instructions and the absence of evidence to support any award of punitive damages. Moreover, as petitioners have shown, the vast majority of other states provide some sort of review for excessiveness and thus clearly have not found the additional burdens to be unmanageable. Pet. 6 & n.3. Nor, obviously, do plaintiffs like Oberg have any cognizable interest in preserving awards that are constitutionally excessive.

II. WHEN REVIEWING A JURY'S AWARD OF PUNITIVE DAMAGES TO DETERMINE WHETHER IT IS EXCESSIVE, COURTS SHOULD, AT A MINIMUM, BE REQUIRED TO CONSIDER CERTAIN OBJECTIVE INDICIA OF WHETHER THE AWARD IS RATIONALLY RELATED TO THE GOALS OF DETERRENCE AND PUNISHMENT

Under this Court's prior decisions, it is clear that the Due Process Clause imposes a limitation on the amounts of punitive damages that civil juries can award. *See, e.g., Waters-Pierce Oil*

Co. v. Texas, 212 U.S. 86, 111 (1909) (reviewing an award of extra-compensatory damages to determine whether it was so "grossly excessive as to amount to a deprivation of property without due process of law"); *Missouri Pacific Ry. v. Tucker*, 230 U.S. 340, 351 (1913) (jury award struck down as "grossly out of proportion to the possible actual damages" and "arbitrary and oppressive"); *Haslip*, 499 U.S. at 23-24 (reviewing an award of punitive damages to determine whether it was so disproportionately large as to "cross the line into the area of constitutional impropriety") (footnote omitted). Although the Court has never precisely defined the contours of that limitation, it has held that "general concerns of reasonableness . . . . properly enter into the constitutional calculus." *Haslip*, 499 U.S. at 18; *see also TXO Prod. Corp.*, 113 S. Ct. at 2720 (plurality opinion) (citing *Haslip*).

This "constitutional calculus" thus remains elusive. The Court has never specifically addressed the *standards* that courts should use in deciding whether a jury's award of punitive damages is so grossly unreasonable as to violate the Due Process Clause. In *Haslip*, the Court approved the totality of Alabama's scheme for reviewing such awards, but did not indicate which aspects of that scheme (if any) were constitutionally required. 499 U.S. at 20-23. Similarly, in *TXO Prod. Corp.*, the Court held that the trial and appellate courts had made an adequate review of the punitive damages award, without indicating which aspects of that review (if any) were constitutionally required. 113 S. Ct. at 2724.

The *amici* suggest that, in reviewing awards of punitive damages under the Due Process Clause, courts should give attention to the purposes underlying such awards: to punish misconduct and to deter its repetition.[10] Specifically, courts

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[10] This Court has consistently identified deterrence and punishment as the principal purposes underlying punitive damages; so have the great majority of jurisdictions. *See, e.g., Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 350 (1974); *Memphis Community School Dist. v. Stachura*, 477 U.S. 299, 306 n.9 (1986); *Browning-Ferris Indus. v. Kelco*

should be required to consider whether a particular award is rationally related to the goals of deterrence and punishment -- an approach that this Court approved in *Haslip*. *See Haslip*, 499 U.S. at 21 (approving Alabama's standards for appellate review of punitive damages awards because that review "makes certain that the punitive damages are reasonable in their amount and rational in light of their purpose to punish what has occurred and to deter its repetition"). And, to ensure that courts consult something other than their own preconceptions in evaluating the rationality of such awards, courts should be required to consider certain objectively measurable indicia of what amounts are reasonably necessary to serve the goals of deterrence and punishment.

The *amici* are not proposing that the Court formulate an ironclad "test" for determining the constitutionality of punitive damages awards, but merely that it articulate a non-exclusive list of factors, none of which would necessarily be dispositive in any particular case, for courts to consider when analyzing the constitutionality of such awards. The states, of course, would remain free to determine that awards are excessive under state-law principles, even when those awards do not violate the Due Process Clause, and to legislate appropriate standards for assessing whether the awards are excessive under state law.[11]

Disposal, Inc., 492 U.S. 257, 275 (1989); *Haslip*, 499 U.S. at 19; *see also* 1 J. Ghiardi & J. Kircher, *Punitive Damages Law and Practice* § 4.14 (1992); J. Sales & K. Cole, *Punitive Damages: A Relic That Has Outlived Its Origins*, 37 Vand. L. Rev. 1117, 1126 (1984); Restatement (Second) of Torts § 908(1) (1979).

[11] *See, e.g., Transportation Ins. Co. v. Moriel*, No. D-1507, 1994 Tex. LEXIS 23 (Tex. Feb. 2, 1994), at *59-61 (although court did not reach the issue of whether Texas' procedures for assessing and reviewing punitive damages violated the Due Process Clause, it exercised its authority under the common law to modify those procedures).

A. Courts Should Consider The Extent To Which The Defendant Profited From Its Misconduct

The amount of gain or profit that the defendant has received from the plaintiff as a result of his misdeeds is an appropriate element in measuring deterrence. *See Haslip*, 499 U.S. at 22 (in approving Alabama punitive damages analysis, the Court noted that one of the many factors Alabama courts look to is the "profitability to the defendant of the wrongful conduct"); *see also* D. Dobbs, *Ending Punishment In "Punitive" Damages: Deterrence-Measured Remedies*, 40 Ala. L. Rev. 831 (1989); Owen, *Punitive Damages in Products Liability Litigation*, 74 Mich. L. Rev. 1258, 1286 (1976). The defendant's profits from his misconduct -- or, in some cases, where the defendant fails to profit as expected, his expected profits -- are objectively-based and often ascertainable without substantial difficulty. Removing the actual or expected gain, in addition to requiring the defendant to compensate the plaintiff for his actual losses, makes it less likely that the defendant will repeat the conduct. A gain-based measure of this sort sends a clear signal to defendants that such misdeeds do not pay and, thus, will often fully serve the deterrent function.

B. In Some Cases, Courts Should Also Consider The Plaintiff's Reasonable Litigation Costs

A "gain-based" measure of extra-compensatory damages may not always adequately serve the deterrent function; it may over- or underserve this purpose. A defendant may, for example, escape effective deterrence when its conduct is rarely challenged in private litigation -- i.e., when the cost of private enforcement exceeds the plaintiff's damages. *See* J. Mallor & B. Roberts, *Punitive Damages: Toward a Principled Approach*, 31 Hastings L. J. 639, 650 (1980); *cf.* Owen, *Punitive Damages in Products Liability Litigation*, 74 Mich. L. Rev. at 1285 (noting that the deterrent effect of punitive damages depends, in part, on "the manufacturer's perception of the likelihood of his being identified and punished"). In such a case, an appropriate measure of deterrence may include the plaintiff's reasonable litigation costs,

to the extent not otherwise provided by statute. *See Haslip*, 499 U.S. at 22 (in approving Alabama punitive damages analysis, the Court noted that one of the many factors Alabama courts look to is "all the costs of litigation"); *see also* Dobbs, *Ending Punishment in "Punitive" Damages: Deterrence-Measured Remedies*, 40 Ala. L. Rev. at 890-94. Shifting the plaintiff's reasonable litigation costs to the defendant in these types of cases could achieve appropriate deterrence by encouraging otherwise uneconomical litigation and, at the same time, removing the defendant's incentive to continue his misconduct. This measure, as with the gain-based measure, is relatively objective and, given the courts' experience with assessing attorneys' fees, hardly unfamiliar.

C. Courts Should Consider The Quantifiable Harm That Has Resulted From The Defendant's Misconduct And The Quantifiable Harm That Was Substantially Likely To Result From That Misconduct

Although extra-compensatory damages based on a deterrence-based measure will often serve simultaneously to deter and punish, there may be cases in which such a measure underserves the punitive function -- as, for example, where a defendant expects no gain from his misconduct. In such cases, adjusting an extra-compensatory award to serve its punitive purpose may be necessary. *Cf.* Owen, *Punitive Damages in Products Liability Litigation*, 74 Mich. L. Rev. at 1317 ("[t]he punishment function is the final factor to be considered in developing a standard for the measurement of punitive damages").

Whether a defendant "deserves" punishment beyond an amount necessary to deter his future misconduct turns on the gravity of his misdeeds. *See* D. Ellis, Jr., *Fairness and Efficiency in the Law of Punitive Damages*, 56 S. Cal. L. Rev. 1, 6 (1982). Two relatively objective and verifiable measures of how serious the defendant's misconduct was are (1) any quantifiable harm that the misconduct has caused to the plaintiff and (2) any additional, quantifiable harm that, at the time of the defendant's misconduct, was substantially likely to result from that misconduct. *See TXO*

Prod. Corp., 113 S. Ct. at 2721-22 (analyzing the financial harm that was likely to result, but did not result, from the defendant's misconduct); *Haslip*, 499 U.S. at 21 (in approving Alabama punitive damages analysis, the Court noted that one of the many factors Alabama courts look to is "whether there is a reasonable relationship between the punitive damages and the harm likely to result from the defendant's conduct as well as the harm that actually has occurred").

The harm that the plaintiff suffered from the defendant's misconduct can generally be quantified by looking at the amount of compensatory damages awarded. Provided that the compensatory award itself is supportable and not improperly inflated, courts reviewing the award should give primary, if not exclusive, consideration to that figure in quantifying the harm. However, when a plaintiff has provided the jury (and a reviewing court) with a reasonable and demonstrable basis for quantifying other kinds of harm (such as any additional, unrealized harm that the plaintiff might have suffered), a court reviewing the punitive damages award should also take those harms into consideration.

D. Courts Should Also Compare The Award With Awards In Similar Cases And With Legislative Penalties For Similar Misconduct

Two more relatively objective and measurable benchmarks for determining what amount of punitive damages will serve the punitive purpose are legislative penalties for misconduct similar to the defendant's conduct and punitive damage awards made in other similar cases.

What is an appropriate punishment for a defendant's misconduct may, in some cases, be apparent from legislative penalties for similar conduct. Many states have enacted statutes prescribing penalties, either civil or criminal, for certain intentional or negligent conduct that is similar to conduct that exposes a defendant to punitive damages. That legislative assessment concerning what "punishment" is appropriate serves an important role in ascertaining whether an extra-compensatory award for comparable conduct not subject to the legislative

penalty is rationally related to that purpose. *See Browning-Ferris Indus. v. Kelco Disposal, Inc.*, 492 U.S. at 300-01 (O'Connor and Stevens, JJ., concurring in part and dissenting in part); *Haslip*, 499 U.S. at 23 (while declining to accord conclusive weight to analogous legislative fines, the Court examined the Alabama legislative penalty for comparable conduct).

Also, in at least some cases, comparing the jury's punitive damages award with the awards made in other cases will assist a reviewing court in determining whether a jury (perhaps under the influence of passion and prejudice) has made an award that greatly exceeds the amount rationally necessary to punish the defendant. *See TXO Prod. Corp.*, 113 S. Ct. at 2719-2720 (plurality opinion) (refusing to make such comparisons, standing alone, a "test" of the presumptive constitutionality of an award, but acknowledging that "the fact that an award is significantly larger than those in apparently similar circumstances might, in a given case, be one of many relevant considerations"); *Haslip*, 499 U.S. at 21 (the Court noted with approval that when reviewing punitive damages awards, the Alabama Supreme Court "first undertakes a comparative analysis").

These objective factors are, of course, only guides for courts charged with reviewing punitive damages awards. But consideration of these factors by reviewing courts should ensure that litigants are not subjected to punitive damages that are constitutionally excessive and that punitive damages -- when warranted at all -- are awarded in amounts that reasonably serve their deterrent and punitive purposes.

CONCLUSION

Because Oregon does not provide for any post-trial judicial review of punitive damages awards for excessiveness, much less for post-trial judicial consideration of any objective factors for determining whether a jury's punitive damages award is constitutionally excessive, its procedures do not comport with the requirements of the Due Process Clause. Therefore, the judgment below should be reversed.

Respectfully submitted,

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